PUBLIC PROSECUTOR

v.

KIAN MEI SDN. BHD.

HIGH COURT BORNEO, SANDAKAN
IAN HC CHIN JC
[CRIMINAL APPEAL NO. S(41) 8 OF 1991]
15 SEPTEMBER 1992

ADMINISTRATIVE LAW: *Delivery of grounds of decision by Sessions Court - Undue delay - Whether injustice caused.*

EVIDENCE: *Price Control Act 1946 - No statutory presumption - Whether presumption under s. 114 of Evidence Act 1950 applied.*

TRADE AND INDUSTRY: *Furniture without price tags seized - Offence under Price Control Act 1946 - Respondent/retailer pleaded not guilty - No case to answer - Whether failure to physically produce the furniture in Court fatal to prosecution case - Whether prosecution had adduced credible evidence that the furniture were displayed for sale or were displayed as samples of goods for sale - O. 3(1) & 5 Price Control (Indication of Price by Retailer) Order 1977.*

This was an appeal by prosecution against discharge and acquittal of the respondent/retailer by the Magistrate from the charge of having displayed furniture either for sale or as samples of goods for sale which was an offence under the Price Control Act 1946 and punishable under s. 22(2) of the same Act.

The prosecution had filed a notice of appeal on 10 December 1987. However, the notes of proceedings and grounds of decision were only ready on 13 February 1991 and sent to the prosecution on 5 August 1991, thereafter which the prosecution filed the petition of appeal on 23 August 1991.

The learned Magistrate had based his no case to answer ruling on two grounds, *viz.*

(i) The failure to produce the furniture physically was fatal to the prosecution case.

(ii) Whether the prosecution had produced inherently credible evidence that the furniture were displayed for sale or were displayed as samples of goods for sale.

On 9 July 1987, an assistant enforcement officer of the Ministry of Trade (PW1), finding the furniture without price tags, seized them. Two employees of the respondent offered the following explanation to PW1 as to why there were no price tags. The prosecution had to prove whether the furniture were "displayed for sale or as samples of goods for sale" under Price Control (Indication of Price by Retailer) Order 1977.

Held:

[1] As the prosecution had adduced photographic evidence of the existence of the furniture without price tags and the place where the furniture were kept, failure to produce the furniture physically in Court was not fatal to the prosecution case: *(Chong Ah Chai & Ors. v. PP).*

[2] There was no evidence that someone had asked to buy the furniture in question and the same were offered for sale. Nor was there evidence that those furniture were samples of similar furniture that can be bought.

[3] The reliance on s. 114 of Evidence Act 1950 to presume or infer that whatever furniture displayed in the showroom or shop premises of the respondent were for sale were rebutted on the evidence of PW1 himself and another prosecution witness PW3.

[4] The appeal could also have been dismissed on the ground of unduly delay by the Magistrate in giving the grounds of the decision which had prejudiced the respondent *(Voon Chin Fatt v. PP; TN Nathan v. PP; PP v. Choo Chuan Wang).*

[Appeal dismissed.]

Cases referred to:
Chong Ah Chai & Ors. v. PP [1979] 2 MLJ 262 ***(foll)***
Voon Chin Fatt v. PP [1948-49] MLJ supp 131 ***(foll)***
TN Nathan v. PP [1978] 1 MLJ 134 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 114
Price Control Act 1946, s. 22(2)
Price Control [Indication of Price by Retailer] Order 1977, O. 3(1), (5)

JUDGMENT

Ian HC Chin JC:

This is an appeal against the decision of the learned Magistrate to discharge and acquit the respondent after ruling that there was no case to answer. I heard the appeal of the Public Prosecutor on 14 September 1992 and I on that day dismissed the appeal. I now give my reasons for doing so.

I. ***The Charge.***

The respondent was charged in the Magistrate Court with the following offence:

> That you on 9 July 1987 at about 10.50 a.m., at lot No. 4, 5 Yeng Seng Building, Mile 2, Labuk Road, Sandakan in the District of Sandakan, in the State of Sabah, being a retailer of goods mentioned in the schedule, did fail to affix labels, tags or marks on the following scheduled goods:
>
> (i) 'MINANO' sofa with a small table - 1 set.
>
> (ii) 'ROBERT' Cabinet - 1 unit
>
> (iii) 'NANCY' Cabinet - 1 unit
>
> (iv) small cabinet size 2½ ft. x 1 1/2 ft. x 4 ft. unit - 1 unit
>
> (v) Book cabinet - 1 unit
>
> which were displayed either for sale or as samples of goods for sale in the said premises, indicating the price per unit of such goods and that you have thereby contravened the provisions of O. 3(1) of the Price Control (Indication of Price by Retailer) Order 1977 (gazetted *vide* P.U.(A) 122 dated 19 May 1977) and by virtue of O. 5 of the said order you have thereby committed an offence under the Price Control Act 1946 which is punishable under s. 22(2) of the same Act (Act 121 Revised 1973).

II. ***Magistrate's decision.***

The respondent pleaded not guilty on 13 September 1987. The trial was held on 9 November 1987 and 21 November 1987. Submissions at the close of the prosecution's case were made on 23 November 1987. The learned Magistrate on 4 December 1987 ruled there was no case to answer. The prosecution filed its notice of appeal on 10 December 1987. The notes of proceedings and grounds of decision were only ready on 13 February 1991 (more than 3 years after the learned Magistrate had made her decision) and were only sent to the prosecution on 5 August 1991 thereafter which the prosecution filed the petition of appeal on 23 August 1991. The learned Magistrate had long left the service and this accounts for the delay in getting the grounds of decision. In the end, the so called grounds of decisions were actually sketchy notes on a piece of paper which the Court assumes were the grounds of the learned Magistrate's decision since the hand-writing bears similarity to that of the learned Magistrate though the paper bears no signature.

III. ***The issues.***

The learned Magistrate ruled that the failure to physically produce the furniture in Court was fatal to the prosecution case. She is clearly wrong because there is no reason for her not to abide by the decision of the Federal Court in the case of *Chong Ah Chai & Ors. v. PP* [1979] 2 MLJ 262 since the prosecution had adduced evidence of the existence of the furniture being without price tags, adduced photographs taken of the furniture in question and adduced evidence of the place where the furniture were kept. The furniture on account of their bulkiness were not produced in Court though admitted as Exhibits P2, P3, P4, P5 and P6.

The other issue, the resolution of which will dispose of this appeal, is whether the prosecution had adduced not inherently incredible evidence that the furniture were displayed for sale or were displayed as samples of goods for sale. For this exercise the evidence will have to be perused.

IV. ***Prosecution Evidence.***

PW1, an Assistant Enforcement Officer of the Ministry of Trade, on 9 July 1987 visited the premises of the respondent and found furniture without price tags. He wanted to seize the furniture. Two employees (a Mr. Foo and a Miss Yoo) of the respondent explained to PW1 why there were no price tags. These explanations were:

(a) the furniture had just arrived from the store;

(b) the buyer of the furniture had left 15 minutes ago before PW1 arrived;

(c) the sale is supported by a receipt dated 7 July 1987; and

(d) two items of the furniture, the small cabinet and the book cabinet, were not for sale but were gifts.

PW1 explained why he was not satisfied with the said explanations. He maintained that furniture that had just arrived from the store should be in a dirty condition and placed disorderly which is not the case here. He could not accept the explanations (b) and (c) because one employee had said the furniture were sold on 7 September 1987. As for the explanation (d), he said the employees could not show anything to prove the items were offered free. Photographs show that the premises contained various furniture and the respondent was licensed to sell furniture. Those were the relevant part of the evidence in examination-in-chief. Under cross-examination, he said there were similar furniture without price

tag which he did not seize because these furniture were not clean, not properly arranged and therefore must have just arrived from the store. He said he was shown two receipts showing sales of furniture of the same description to two persons and that these receipts are probably evidence of the sale of the furniture that he had seized. He did not verify with the said two persons who had allegedly bought the furniture. PW2 corroborated PW1 substantially. PW3, an employee of the respondent, testified that announcements of items of furniture offered as gifts were displayed in the premises.

V. ***The Law.***

The subsidiary legislation creating the offence concerned is the Price Control (Indication Of Price By Retailer) Order 1977 which for ease of reference is reproduced here:

> Price Control (Indication Of Price By Retailer) Order 1977.
>
> In exercise of the powers conferred by para. (d) of subsection (1) of s. 13 of the Price Control Act 1946, the Price Controller with the approval of the Minister makes the following order:
>
> 1. This order may be cited as the Price Control (Indication of Price by Retailer) Order 1977 and shall come into force on the 1 May 1977.
>
> 2. In this order unless the context otherwise requires:
>
> "goods" means "goods" as defined under s. 2(1) of the Price Control Act 1946;
>
> "retailer" means any person who sells goods by retail sale.
>
> 3. (1) Every retailer of the goods mentioned in the Schedule shall affix labels, tags or marks on the goods or the bags or containers of such goods which are displayed whether for sale or as samples of goods for sale in the premises of the retailer indicating the price per unit or per unit weight or measure of such goods.
>
> (2) Every retailer of the goods mentioned in the Schedule shall, where the nature and size of the goods is such that it is not practicable to affix labels, tags or marks on such goods or the bags or containers of such goods in accordance with subparagraph (1), maintain and display a list describing the goods so as to be sufficiently identifiable and indicating against such goods the price per unit or per unit weight or measure of the goods.
>
> (3) The particulars required by subparagraphs (1) and (2) appearing on such labels, tags, marks or list shall be in Bahasa Malaysia and where the retailer does not read Bahasa Malaysia there shall also be a translation in the language of the retailer.
>
> (4) Such labels, tags, marks or lists shall be of such size and colour so placed as to be sufficiently conspicuous to any person intending to purchase.
>
> 4. Every retailer shall permit any person intending to purchase to examine the list as specified in subparagraph (2) of para. 3.
>
> 5. Any person who contravenes or fails to comply with any provision of this order shall be guilty of an offence against the Price Control Act 1946.
>
> 6. The Price Control (Indication of Grade Quality and Price by Retailer) Order 1974 is revoked.

The prosecution has therefore to prove the furniture were "displayed whether for sale or as samples of goods for sale". In this case there is no evidence that someone had asked to buy the furniture in question and the same were offered to be sold by the employee of the respondent. Neither was there any evidence that those furniture were samples of similar furniture that can be bought. The prosecution had argued that it could be presumed that since the furniture in question were placed in a showroom together with other furniture

bearing price tags, the furniture in question were displayed for sale or as samples of furniture for sale. There is no such statutory presumption in the Price Control Act 1946. The only possible avenue for assistance is s. 114 of the Evidence Act, the relevant part of which reads:

> Court may presume existence of certain fact.
>
> 114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case ...

It is therefore legitimate, in view of s. 114 of the Evidence Act, to presume or infer that whatever furniture displayed in the showroom or shop premises of the respondent, a licensed retailer of furniture, were for sale. But such a presumption can be displaced by facts showing the contrary, like the obvious instance of furniture bearing signs saying "Not For Sale" or "Sold". We have therefore to see whether in this case there are facts elicited that rebut the said presumption. I am of the same opinion as the learned Magistrate that there are evidence in the prosecution's case that rebut the said presumption and these evidence had already been summarized above. But for precision I will quote from the notes of proceedings the relevant parts of the evidence of PW1 tending to rebut the said presumption:

> When Mr. Foo refused to allow me to seize, Miss Yoo told me that the Minano sofa set, Robert & Nancy cabinets had been sold. And the small cabinet and book shelf are given free. I didn't accept the explanation because before that, Mr. Foo told me that the buyer had left the shop 15 minutes before I arrived. I didn't accept the explanation that the small cabinet & book are going to be offered as free gifts as I didn't find any notice saying they're going to be offered as free gifts ...
>
> Yes, raid done on 9 July 1987 and the receipt indicated sale on 7 July 1987. I think I was shown two receipts - one to Mr. Chong and the other for Andrew. I didn't see the amount stated in the receipt and I did see particulars stated in the receipt, it was "Minano, Robert, Nancy". Therefore maybe the furnitures seized were sold as proved by the receipt.
>
> No. I didn't check or take any steps in the investigation to call on Mr. Chong or Andrew to find out whether those goods are in fact purchased or not. Therefore it's possible that Mr. Chong & Andrew had possibly paid some money for the purchase of those furniture. I was shown only the receipts. I didn't seize the receipts because Mr. Foo told me that 15 minutes ago the purchasers had left, apart from that I have no other reason.

There is therefore evidence to show that the furniture had in fact been sold and PW3 evidence tend to corroborate the gift of the small cabinet and the book shelf. That being the case, the presumption had therefore been rebutted and the prosecution had therefore failed to make out a case if unrebutted would warrant a conviction. The furniture had already been sold and were therefore not displayed for sale. It was next argued that the said presumption can be invoked to support the contention that the furniture in question though sold were displayed as samples of furniture for sale because though they were sold they remained in the premises with the result that people can order similar furniture by looking at those already sold but still displayed in the premises. But I am of the opinion such a presumption cannot be had because there is no evidence that there is a stock of such furniture for sale of which the furniture in question were sample and because the sold furniture though remaining in the premises could well be awaiting delivery after being sold.

All that the enforcement officers need do in such cases to obtain direct evidence is to offer to buy from the retailer the furniture in question to prove whether the furniture are displayed whether for sale or as samples of goods for sale; if the retailer in response offers to sell the

furniture or similar furniture in the store or elsewhere at a price, that would constitute evidence that the furniture have been displayed for sale or as sample of the furniture for sale. There is no such or such similar evidence in this case with the result that the prosecution had to resort to the said presumption which in the end was rebutted.

VI. ***Conclusion.***

I therefore dismiss the appeal. I would also have dismissed this appeal on the ground of delay on the part of the learned Magistrate in giving the grounds of the decision which had prejudiced the respondent. It is the opportune moment to remind myself as well as the Session Judges and Magistrates, what were said in three cases with regards to delay. In *Voon Chin Fatt v. PP* [1948-49] MLJ Supp. 131, at 133, Spenser Wilkinson J said:

> The interval between notice of appeal and delivery of grounds of decision should, in such a case be a matter of days, not weeks, much less months. Indeed there is a very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. Where delay occurs, not only have important details faded from the mind of the Magistrate who tried the case, but also additional work is involved as the whole case has to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with.

The sentiment is echoed in the case of *TN Nathan v. PP* [1978] 1 MLJ 134, at 136, where Gunn Chit Tuan J (as he then was) said:

> In the present case, I regret to note that a summary trial under the provisions of the Criminal Procedure Code had to take so long to complete and that the judgment was not signed until eleven months after conclusion of the trial. Moreover, the further delay of another two years before receiving the grounds of decision was most unsatisfactory and has prejudiced the appellant.

It ought also to be noted that in connection with the question of delay, Edgar Joseph Jr. J (as he then was) in the unreported case of *PP v. Choo Chuan Wang* [Criminal Trial No. 57-7-83 in the High Court in Malaya at Penang], in respect of delay in the hearing of a case, held:

> ... that Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right, then, in the words of Sandhawalia, CJ in *Madheswardhari Singh v. the State (ibid)*, he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

Therefore, let not the Courts of justice on account of delay (be it delay in the hearing of a case or the giving of the grounds of the decision) be the cause of injustice. Hopefully, the delay that had occurred in this case will not recur elsewhere.

Also found at [1992] 4 CLJ 2168